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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6568

JOHNNIE B. HANKERSON,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

CITATIONS TO OPINIONS BELOW

From a verdict of guilty of second degree murder and judgment of imprisonment entered by the Superior Court of Nash County, North Carolina on November 21, 1974, petitioner appealed to the North Carolina Court of Appeals (Intermediate Appellate Court). The opinion of the North Carolina Court of Appeals finding no error in petitioner's trial is reported in *State v. Hankerson*, 26 N.C. App. 575, 217 S.E.2d 9 (1975), *Arnold, J.*, dissenting. Petitioner exercised his appeal of right pursuant to North Carolina General Statute 7A-30 (2) which grants an appeal as a matter of right from the North Carolina Court of Appeals to the Supreme Court of North Carolina in cases in which there is a dissent. The opinion of the Supreme Court of North Carolina finding no error is reported in *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975) (A. 16).

JURISDICTION

Petitioner invoked the jurisdiction of this Court pursuant to Title 28, United States Code. §1257(3), it being petitioner's contention that he was denied due process of law under the Fourteenth Amendment to the Constitution of the United States by the decision of the North Carolina Supreme Court in *State v. Hankerson* which refused to apply the constitutional principals set out by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), to petitioner's case. The decision of the Supreme Court of North Carolina in *State v. Hankerson* was rendered on December 17, 1975. Petitioner made application to this Court through counsel for an Extension of Time Within Which to File Petition for Writ of Certiorari. The application was granted extending the time for filing such Petition to and including April 15, 1976 by order of Chief Justice Warren E. Burger dated March 12, 1976. On April 12, 1976 Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari were filed in this Court. On October 4, 1976, the Motion and Petition were granted by this Court.

CONSTITUTIONAL PROVISION INVOLVED CONSTITUTION OF THE UNITED STATES, AMENDMENT *XIV*

"§. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Did the Supreme Court of North Carolina deny the petitioner, Johnnie B. Hankerson, due process of law under the Fourteenth Amendment to the Constitution of the United States when said Court refused to apply *Mullaney v. Wilbur*, 421 U.S. 684 (1975) to petitioner's case because it was tried prior to June 9, 1975?

STATEMENT OF THE CASE

On September 29, 1974, petitioner was arrested and taken into custody on the charge that he did unlaw-

fully, willfully, and feloniously and of his malice aforethought kill and murder Gregory Eugene Ashe. This charge resulted from the death of Gregory Eugene Ashe on said date from a wound caused by a bullet fired from a pistol. Petitioner and his attorney waived the finding and return into court of a bill of indictment and agreed that the case be tried upon information alleging that on or about the 29th day of September 1974, in Nash County, petitioner unlawfully and willfully did feloniously and with malice by the use of a deadly weapon, to wit a pistol, kill and murder Gregory Eugene Ashe contrary to the form of the statute in such case made and provided and against the peace and dignity of the State. At the November 18, 1974, Session of Nash County Superior Court, upon his plea of not guilty, petitioner was tried and convicted of second degree murder and sentenced to a term of not less than twenty (20) nor more than twenty-five (25) years in the State's prison.

Evidence for the State at trial tended to show the following facts: Gregory Ashe died September 29, 1974 as the result of a gunshot wound to the heart. Ashe and some friends had been together on the night in question and upon Ashe being unable to start his car, his companions started walking away from the car. As Ashe went back to make another attempt to start the car, the friends heard a gunshot, heard Ashe exclaim he was shot, and saw a yellow Plymouth "Satelite" speed away from the scene. After some difficulty in finding Ashe due to the darkness of the night, his body was found lying face down in a nearby field with a cigarette that had been lighted in one hand. After determining that the automobile seen leaving the scene belonged to petitioner, law enforcement officers went to his home where petitioner gave the following story.

Petitioner said that he was riding slowly near where

Gregory Ashe was shot when someone asked him for a light. He stopped and gave his cigarette lighter to a black male, and when he reached to put the lighter back in its holder, he felt someone shaking the right front door, which door was locked. Petitioner further stated that he was then grabbed by the person to whom he had given a light and that this person also put a knife to his throat. Petitioner told the officers that he then picked up a gun from the right front seat of his car and shot at his assailant before speeding away. A law enforcement officer searched petitioner's car and found a knife on the seat to the right of the driver's seat. Petitioner gave the officer a shirt and showed him grease marks on the shirt which he stated were left by the person who had assaulted him. Witnesses for the State testified that the deceased had never been seen with a knife like the one found on the seat of the car. Blood was observed on the driver's side of the car, just behind the door.

Evidence for petitioner consisted of petitioner's account of the shooting as given to the officers and testimony by his family that upon coming home he admitted that he had shot at someone after having a knife put to his neck. Petitioner testified that he did not own the knife found in his car and members of his family stated that they had never seen him with a knife like the one found on the front seat of the car. Petitioner surmised that his assailant dropped the knife in the car. A number of witnesses testified concerning petitioner's good character.

In apt time petitioner gave notice of appeal to the North Carolina Court of Appeals which appeal was argued in the North Carolina Court of Appeals on May 29, 1975. The North Carolina Court of Appeals upheld the judgment of the trial court, in *State v. Hankerson*, 26 N.C. App. 575, 217 S.E.2d 9 (1975) decided July

16, 1975, certified July 28, 1975, *Arnold J.*, dissenting. Petitioner appealed to the Supreme Court of North Carolina pursuant to North Carolina General Statute 7A-30(2), which statute grants an appeal as a matter of right from the North Carolina Court of Appeals to the Supreme Court of North Carolina in cases in which there is a dissent. Petitioner's Notice of Appeal to the Supreme Court of North Carolina was filed in that court on July 31, 1975. On August 19, 1975 petitioner filed in the Supreme Court of North Carolina a Motion to Amend the Record to note additional exceptions and assignments of error which would raise for review additional questions suggested by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (hereinafter referred to as *Mullaney*), decided on June 9, 1975. Petitioner's Motion to Amend the Record to note additional exceptions and assignments of error was allowed on September 2, 1975, and the case was argued in the Supreme Court of North Carolina on September 10, 1975. The Supreme Court of North Carolina affirmed petitioner's conviction in a decision filed December 17, 1975 and reported in 288 N.C. 632, 220 S.E.2d 575, on the theory that *Mullaney* was not applicable to cases tried prior to June 9, 1975.

SUMMARY OF ARGUMENTS

I.

THE SUPREME COURT OF NORTH CAROLINA ERRED IN NOT APPLYING *MULLANEY V. WILBUR* RETROACTIVELY SINCE THE DOCTRINE OF *MULLANEY* AS IT RELATES TO PETITIONER'S CASE GREATLY AFFECTED THE RELIABILITY OF THE FACT-FINDING PROCESS.

In petitioner's case, the jury was instructed that (a) in order to reduce the crime from second degree murder to manslaughter, defendant had the burden of proof to the satisfaction of the jury that there was no malice on his part, and (b) that to excuse his act altogether on grounds of self-defense, the defendant had the burden of proof to the satisfaction of the jury that he acted in self-defense. The North Carolina Court held that these instructions violated the constitutional principals of *Mullaney v. Wilbur*, but did not apply *Mullaney* to petitioner's case. Petitioner contends that these instructions greatly affected the fact-finding function in his case and that he therefore should have been given the benefit of *Mullaney v. Wilbur*.

II.

THE SUPREME COURT OF NORTH CAROLINA SHOULD HAVE GIVEN *MULLANEY V. WILBUR* AT LEAST THE LIMITED RETROACTIVE AFFECT OF APPLYING IT TO PETITIONER AS HIS CASE WAS PENDING ON DIRECT APPEAL ON JUNE 9, 1975.

North Carolina law does not require a defendant to except at trial to erroneous jury instructions as to applicable law, and such exceptions may be set out for the first time in his case on appeal. During the appellate process of petitioner's case in the State Court, petitioner took appropriate action to take exception to the judge's charge in petitioner's trial as it related to *Mullaney*. Petitioner's case was pending on direct appeal as a matter of right when *Mullaney* was decided June 9, 1975, and petitioner's exceptions to the judge's charge in his trial therefor were as effective as if raised at the time such erroneous instructions were made.

ARGUMENTS

ARGUMENT I.

THE SUPREME COURT OF NORTH CAROLINA ERRED IN NOT APPLYING *MULLANEY* RETROACTIVELY SINCE THE DOCTRINE OF *MULLANEY* AS IT RELATES TO PETITIONER'S CASE GREATLY AFFECTED THE RELIABILITY OF THE FACT-FINDING PROCESS.

On June 9, 1975, this Court decided *Mullaney v. Wilbur*, 421 U.S. 684, which held that Maine's rule requiring a defendant charged with murder to prove by a preponderance of the evidence, in order to reduce homicide to manslaughter, that he acted in the heat of passion on sudden provocation, violated the requirement, under the due process clause of the Fourteenth Amendment, that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged, and to satisfy due process, the prosecution must prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.

The Supreme Court of North Carolina in its decision in *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975) reversed long-standing rules as to the burden of proof in homicide cases in North Carolina:

> "We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the

> presumption of unlawfulness, that he killed in self-defense. *The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in Mullaney*. We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975." 228 N.C. at 643. (A. 27) (Emphasis supplied.)

The Supreme Court of North Carolina then left no question that *Mullaney* was applicable in North Carolina to the burden of proof doctrines in a homicide case, and that these doctrines as applied by the trial judge in his charge to the jury in petitioner's case violated the Due Process Clause of the Fourteenth Amendment. However, the Supreme Court of North Carolina citing that petitioner's case was tried November 21, 1974 and that *Mullaney* was decided June 9, 1975, declined, "without further guidance from the Supreme Court, to give the decision [*Mullaney*] retroactive effect." *State v. Hankerson, supra,* at 652 (A. 27).

The Supreme Court of North Carolina recognized that within the three-pronged test for retroactive application of a new constitutional rule, the purpose to be served by the new rule is the most important prong, more so than either reliance on previous decisions, or the effect on the administration of justice of retroactive application. *State v. Hankerson, supra,* at 653 (A. 37). Relying on *Ivan V. v. City of New York*, 407 U.S. 203 (1972) which held retroactive *In Re Winship*, 397 U.S. 358 (1970), and also citing *Roberts v. Russell*, 392 U.S.

293 (1968) which held retroactive *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court of North Carolina noted that "[i]f the rule is designed to protect the reliability of the fact finding process and 'the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined' then it has been said that the decision will on this basis alone be given full retroactive effect." *State v. Hankerson, supra,* at 653 (A. 37). However, the Supreme Court of North Carolina, in an effort to justify its "prospective only" application of *Mullaney* to petitioner's case, then went on to conclude, "how that factor [the purpose to be served by the new rule] is approached by the Supreme Court *seems sometimes* to depend on analysis of the other two factors." *State v. Hankerson, supra,* at 653 (A. 38). (Emphasis supplied.) In reaching this conclusion the Supreme Court of North Carolina relied heavily on *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966).

Petitioner contends that the North Carolina Supreme Court should never have considered the two prongs of previous reliance on past decisions or the effect on the administration of justice of retroactive application of the new rule. For as in *Ivan*:

> " 'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guiity verdicts in past trials, the new rule has been given complete retroactive effect. 'Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' " *Ivan V. v. City of New York*, 407 U.S. 204 (1972). (Citations omitted.)

Petitioner submits that the constitutional doctrine of *Mullaney* is one designed to overcome an aspect of petitioner's trial that substantially impaired the jury's truth-finding function, and that as such, the new doctrine must be given complete retroactive effect regardless of good faith reliance by state authorities on prior law or practice and despite any impact, even a severe impact, on the administration of justice. The Supreme Court of North Carolina either ignored or refused to see that the purpose of *Mullaney* was to correct error that lay at the very heart of the jury's fact-finding function. The Supreme Court of North Carolina surmised that it is a matter of "*pure speculation*" whether the jury instructions condemned in *Mullaney*, and even condemned by the North Carolina Court in petitioner's case, could in the final analysis effect the fact-finding process of the jury. *State v. Hankerson, supra*, at 655 (A. 40). (Emphasis supplied.) Petitioner submits that the reasoning of the Supreme Court of North Carolina misses the whole significance of *Mullaney* in the establishment of the reasonable doubt standard in the scheme of criminal procedure. For as *Winship* emphasizes, "[t]he [reasonable doubt] standard provides concrete substance for the presumption of innocence–that bedrock 'axiomatic and elementary' principal whose 'enforcement lies at the foundation of the administration of our criminal law.' " *In Re Winship, supra*, at 363. (Citations omitted.)

In enabling itself to consider the less important factors of reliance on previous decisions and the effect on the administration of justice, the Supreme Court of North Carolina placed a jury instruction that required the defendant to carry the burden of proof in the same category with those condemned practices whose effect on the truth-determining process are only *probabilities. State v. Hankerson*, at 655 (A. 40). (Emphasis sup-

plied.) Petitioner does not assert that the best manner for determining whether a case should be given retroactive effect is by first categorizing previous cases and then deciding into which category the case falls. However, a review of the cases of this Court giving prospective only application at least serves the value of showing that petitioner's case clearly does not fall within that line of decisions:

Mapp v. Ohio, 367 U.S. 643 (1961), limitation on use of illegally obtained evidence;

Escobedo v. Illinois, 378 U.S. 478 (1964), right to counsel during police interrogation;

Griffin v. California, 380 U.S. 609 (1965), prosecution's comment on defendant's failure to testify prohibited;

Miranda v. Arizona, 384 U.S. 436 (1966), requirements of investigating officers to warn defendant of rights prior to questioning;

United States v. Wade, 388 U.S. 218 (1967), right to counsel during lineups;

Katz v. United States, 389 U.S. 347 (1967), limitations on electronic eavesdropping;

Duncan v. Louisiana, 391 U.S. 145 (1968), right to jury trial;

Lee v. Florida, 392 U.S. 378 (1968), limitation on use of wiretap evidence at trial;

Boykin v. Alabama, 395 U.S. 328 (1969), requirements in the form of guilty plea;

Chimel v. California, 395 U.S. 752 (1969), limitations on search incident to lawful arrest, and *Coleman v. Alabama*, 399 U.S. 1 (1970), right to counsel at preliminary hearing.

On the other hand, new doctrines which have been given full retroactive effect are:

Griffin v. Illinois, 351 U.S. 12 (1956), right of indigent defendant to transcript on appeal;

Hamilton v. Alabama, 368 U.S. 52 (1961), right to counsel at arraignment;

Douglas v. California, 372 U.S. 353 (1963), right to assistance of counsel on appeal;

Gideon v. Wainwright, 372 U.S. 335 (1963), right to assistance of counsel at trial;

White v. Maryland, 373 U.S. 59 (1963), right to assistance of counsel at guilty plea;

Jackson v. Denno, 378 U.S. 368 (1964), requirement of fair hearing to determine voluntary confession;

Mempa v. Rhay, 389 U.S. 128 (1967), right to assistance of counsel at probation hearing;

Barber v. Page, 390 U.S. 719 (1968), Sixth Amendment right to confrontation during trial;

Bruton v. United States, 391 U.S. 123 (1968), Sixth Amendment right to confrontation prohibits use of confession by codefendant implicating defendant;

Witherspoon v. Illinois, 391 U.S. 510 (1968), disqualification of death penalty inclined jurors;

In Re Winship, 397 U.S. 358 (1970), burden of proof beyond a reasonable doubt required in juvenile proceedings; and

Waller v. Florida, 397 U.S. 387 (1970), double jeopardy applies in State and municipal prosecution on same act or offense.

It is petitioner's argument that the category of condemned practices which are only "probabilities" so far as the integrity of the truth-determining process is concerned is the category listed above which have been given prospective only application. This category of condemned practices is the one this court has consistently found to be essentially prophylactic in character, designed to deter police and courts from practices which have little to do with the accurate determination of guilt or innocence. The major purpose of *Winship* as stated by this Court in *Ivan*, is "to overcome an aspect

of a criminal trial that substantially impairs the truth finding function." *Ivan V. v. The City of New York, supra,* at 205. Petitioner submits that this is likewise the major purpose of *Mullaney*, and that where an individual has been convicted by the use of a jury instruction that puts the burden of proof on that individual, the possibility that his conviction was erroneous, because not supported by proof beyond a reasonable doubt, becomes a reality.

Petitioner takes the position then that the jury instructions which placed the burden of proof on him to satisfy the jury that he killed in the heat of a sudden passion to rebut the presumption of malice and that he killed in self defense to rebut the presumption of unlawfulness were, under *Mullaney*, a greatly determinative factor in the fact-finding process. The instructions of the trial court placed upon the petitioner the burden of proving to the jury's satisfaction the absence of malice in order to reduce the crime from second degree murder to manslaughter. *State v. Hankerson, supra*, at 642 (A. 10). The instructions of the trial court placed upon the petitioner the burden of proving to the jury's satisfaction that he acted in self defense in order to excuse the act altogether. *State v. Hankerson, supra*, at 642 (A. 10). The maximum punishment for second degree murder in North Carolina is now, and was on the controlling date in petitioner's case, life imprisonment and the maximum penalty for manslaughter was and is twenty years imprisonment. (*N.C. Gen. Stats.* §14-17 and §14-18). To deny petitioner the benefit of the constitutional rules laid down in *Mullaney* has constituted as to him the most harmful violation of his constitutional right to due process of law. With that being the case, the factors of reliance by authorities on previous decisions and the effect on the administration of justice of the retroactive application of *Mullaney* are not deserving of consideration.

Petitioner will, arguendo, address himself to these two factors. The extent of reliance by law enforcement authorities on previous standards is worthy of consideration only to the extent that new standards have not been foreshadowed. The strengthening of the reasonable doubt standard as a basic doctrine of due process of law is not an innovative concept. From the premonitions of *Davis v. United States*, 160 U.S. 469 (1895), to the clear implications of *In Re Winship, supra,* six years ago, the trend of due process of law has been to place on the prosecution the burden of proving beyond a reasonable doubt all of the elements of the crime.

The Supreme Court of North Carolina in denying petitioner the benefit of *Mullaney* gave primary weight to the effect retroactive application would have on the administration of justice. *State v. Hankerson, supra,* at 653-655 (A. 38-40). Petitioner admits that retroactive application of *Mullaney* would burden some of those who administer justice. However, the purpose of such a burden, the seeking out and freeing of wrongly convicted defendants and the conviction of only those who are guilty beyond a reasonable doubt, is the ultimate purpose of our system of justice. To say this burden is too expensive, time-consuming, or impractical for our judicial system is to place expediency ahead of due process of law. To say it would free one guilty man, or one hundred, or any number is to make a travesty of our judicial system for as Mr. Justice Harlan stated in his concurring opinion in *Winship*, "the requirement of proof beyond a reasonable doubt in a criminal case is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In Re Winship, supra,* at 372-a statement echoed in *Mullaney, supra*, at 703-04. If this is true, as petitioner contends, the

argument for retroactivity is overwhelming. Our system values truth and due process, though often burdensome, above the effortless administration of justice. The State or Government's interest should only be the conviction of *guilty* people.

Retroactive application affecting trials long past, and in all probability allowing some guilty persons to go free, has been the necessary decision of this Court in those cases wherein full retroactivity was allowed. Such cases have undoubtedly affected the administration of justice in many jurisdictions. Petitioner contends, however, that the individuals who administer justice in those jurisdictions have ultimately served justice far more by bearing this burden. Petitioner asks no more of his state than that it administer to him a fair trial as this Court has defined a "fair trial" and as the constitution guarantees him.

ARGUMENT II.

THE SUPREME COURT OF NORTH CAROLINA SHOULD HAVE GIVEN *MULLANEY* AT LEAST THE LIMITED RETROACTIVE EFFECT OF APPLYING IT TO PETITIONER AS HIS CASE WAS PENDING ON DIRECT APPEAL ON JUNE 9, 1975.

To place *Mullaney* in the time frame of petitioner's case, *Mullaney* was decided between the date of the oral argument on petitioner's appeal in the North Carolina Court of Appeals (A. 1) and the date that court handed down its decision (A. 2) with one of the three judges dissenting. Petitioner then made a timely appeal to the Supreme Court of North Carolina as a matter of right pursuant to North Carolina General Statute 7A-30(2), which grants an appeal of right to that court when there is dissent to the decision of the North Carolina Court of Appeals. After notice of appeal was given by petitioner to the Supreme Court of North

Carolina (A. 2), but before the date of the oral argument on petitioner's appeal in that court (A. 2), petitioner filed in the Supreme Court of North Carolina a Motion to Amend the Record to note additional exceptions and assignments of error raising new questions suggested by *Mullaney*. The State of North Carolina filed a response to the Motion to Amend the Record and prayed that the Motion be denied. However, the Supreme Court of North Carolina allowed the Motion (A. 2), the new exceptions and assignments of error were made a part of the record and the questions suggested by *Mullaney* in petitioner's case were argued before the Supreme Court of North Carolina. As noted in Argument I above, the Supreme Court of North Carolina applied *Mullaney* to change long-standing rules as to the burden of proof in homicide cases in North Carolina, but denied the benefit of *Mullaney* to any cases, like petitioner's, which were tried before June 9, 1975.

It has been a long-standing rule of North Carolina appellate procedure that certain exceptions need not be made at the time error in the trial is committed, and these certain exceptions are, if properly made a part of the case on appeal, deemed taken at the time the alleged error occurred. One of these is an exception to the trial court's instructions as to applicable law. *State v. Lambe*, 232 N.C. 570, 61 S.E. 608 (1950). Petitioner contends that under North Carolina appellate procedure, proper exception was taken to the charge to the jury as it related to *Mullaney*, and that under applicable North Carolina law such exceptions were deemed taken as if made at the time of the erroneous jury instruction. Therefore petitioner further contends that since his case was pending on appeal as a matter of right, the benefit of the exceptions made and preserved to the judge's charge in his case should have been recognized by the Supreme Court of North Carolina to give him the benefit of due process of law under *Mullaney*. To have reached this conclusion, the Supreme Court of North Carolina would not have been influenced, as it ap-

parently was, by what it termed "the devastating impact" the retroactivity of *Mullaney* would have on the administration of justice in this country. *State v. Hankerson, supra,* at 655 (A. 40).

With petitioner having thus followed the proper procedures to take exception to the judge's charge and to properly bring such exceptions before the Supreme Court of North Carolina, petitioner earnestly contends that no final judgment had been entered in his case at the time *Mullaney* was decided. In fact, under the procedures he followed, from a procedural standpoint, it was as if his case had been tried subsequent to *Mullaney*.

Even if the Supreme Court of North Carolina could not accept this reasoning, there is ample authority of this Court to have allowed the Supreme Court of North Carolina to apply *Mullaney* to cases, like petitioner's, which were pending on direct review at the time *Mullaney* was decided. *Linkletter v. Walker*, 381 U.S. 618 (1965). Indeed, *Tehan v. United States, supra* (on which the Supreme Court of North Carolina relied in denying retroactive application, *State v. Hankerson, supra,* at 653), denied the benefit of the new constitutional rule only to those cases in which the judgment of conviction had been rendered, the availability of appeal exhausted, and the time for petition of certiorari elapsed or a petition for certiorari finally denied all before the date of the decision establishing the new rule.

Petitioner's case as it appeared before the Supreme Court of North Carolina was a case of first impression in which that court was presented with the question of the applicability of *Mullaney* to the rules as to the burden of proof in homicide cases in North Carolina. As the narrowest alternative, the Supreme Court of North Carolina should have held *Mullaney* applicable to petitioner's case only (and of course prospectively to other cases). To deny petitioner that narrow benefit of *Mullaney* is to take away from all appellants and their

counsel the incentive of advancing contentions requiring a change in law. Here, petitioner in good time under North Carolina procedure advanced initially the contention that *Mullaney* applied to his situation. The Supreme Court of North Carolina agreed, but the reward for advancing the law goes only to those who follow. That petitioner would be granted such a benefit when it was denied others, whose cases had similar standing in point of time, would be "an unavoidable consequence of the necessity that constitutional adjudication not stand as mere dictum." *Stovall v. Denno*, 388 U.S. 293, at 301 (1967). Just as in *Stovall*, this narrow application of *Mullaney* to petitioner's case would support the principal that issues be resolved in concrete cases and would encourage appellants to pursue legitimate contentions requiring a change in the law. *Stovall v. Denno, Id.*, at 301.

CONCLUSION

Based upon the foregoing Arguments, petitioner asserts that the decision of the Supreme Court of North Carolina should be reversed and petitioner's case remanded to the Superior Court of Nash County, North Carolina for a new trial.

Respectfully submitted,

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